

# **Plaintiffs’ Reply Exhibit 88**

# Exhibit 88

JAMS

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IN RE: FACEBOOK INC., )  
CONSUMER PRIVACY USER )  
PROFILE LITIGATION )  
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HELD VIA ZOOM

REPORTER'S TRANSCRIPT OF PROCEEDINGS:

JAMS Special Master Hearing

Saturday, December 4, 2021

REPORTED BY:

Katy E. Schmidt

RPR, RMR, CRR, CSR 13096

Job No.: 4980290

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JAMS

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IN RE: FACEBOOK INC., )  
CONSUMER PRIVACY USER )  
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JAMS Special Master Hearing on Saturday,

December 4, 2021, at 9:06 a.m., virtually before Kathryn  
E. Schmidt, RPR, RMR, CRR, CSR 13096.

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1 related to the memorandum, or in category 2, the  
2 communications related to the background technical and  
3 audit reports that were prepared in connection with that  
4 app.

5 SPECIAL MASTER GARRIE: If you look above on  
6 page 146, if you look above this -- the paragraph above  
7 that, that's the second group.

8 But that's fine. I understand now the  
9 clarity.

10 All right. Go ahead, Counsel Loeser. I  
11 apologize.

12 MR. LOESER: Yeah. I do want to make sure I  
13 respond to Orin's arguments.

14 One thing that he said that is easy to respond  
15 to, there was some reference to these communications and  
16 Mr. Snyder suggested that, you know, they always cc'd a  
17 lawyer on the communication.

18 Obviously, you know, that's a -- something the  
19 Courts have long ago rejected. You can't just cc a  
20 lawyer on something and then it miraculously becomes  
21 undiscoverable.

22 If the communication is a factual  
23 communication, it's not privileged whether it's cc'd to  
24 a lawyer or not.

25 So that's just -- you know, that's just black

1 letter law. So just to be clear on that.

2 But I want to get back into this notion of  
3 these internal communications and what the order did or  
4 did not say about internal communications.

5 There's not one word in the order that you  
6 will find that says internal communications about the  
7 ADI are not discoverable. That's just not true.

8 And really when you think about what these  
9 communications are, I want to come back to how critical  
10 they really are and what the order did say. And what it  
11 said is that as a general matter, documents generated as  
12 part of that investigation were not created because of  
13 litigation. That's true for internal communications as  
14 well.

15 And the order indicated it encompassed all  
16 materials regardless of form that are not created by  
17 counsel, counsel edits, or any communications with  
18 counsel.

19 And so obviously the internal communications  
20 that are not with counsel, whether they to put a cc to  
21 lawyers or not, if they're factual in nature, then they  
22 are discoverable and they're consistent with the  
23 guidance of this order.

24 And just, again, to make clear, the  
25 communications were after. These are not privileged

1 communications. They're not between lawyers. We've  
2 said to Judge Corely and we've said to you, we don't  
3 want those communications.

4 We want the factual information relating to  
5 the ADI, and that obviously includes these internal  
6 communications.

7 And this is a point worth making as well,  
8 which are these communications, quote, unquote, facts?

9 And in Facebook's materials, they've suggested  
10 there's some contradiction between plaintiffs' request  
11 for the underlying facts of the ADI and the request for  
12 both the internal communications and the communications  
13 with third parties.

14 And, you know, obviously there's not.  
15 Communications often relate to or reflect underlying  
16 facts. Communications can also reflect facts about  
17 knowledge and state of mind.

18 And as everybody knows who's involved in  
19 litigation in the modern era, internal communications,  
20 typically in e-mail, though, now in Slack and in chats,  
21 are often the strongest evidence in a case and can be  
22 ripe with admissions. That's why they're discoverable.  
23 That's why we want them. And that's why Facebook  
24 doesn't want to provide them.

25 Now, I do think it's important to go through

1 this issue with the logging of the call logs, and what  
2 happened with the call logs.

3 And Facebook has this idea that because there  
4 was a dispute over the logs and that dispute rolled into  
5 the eventual order, that this means that all internal  
6 communications somehow were ruled out.

7 And that really distorts the process, so I  
8 think it's important to step back and walk through the  
9 process.

10 And so here's what really happened:

11 In June 2020, plaintiffs requested a briefing  
12 process on the motion to compel. And then in August of  
13 2020, Judge Corely requested that Facebook -- requested  
14 Facebook to provide a privilege log of ADI materials.

15 The logs were provided.

16 And then plaintiffs were asked to pick frankly  
17 from the log -- obviously, we didn't know the content of  
18 any of these documents. We just chose as best we could  
19 from the log and we chose 20 documents.

20 And then Judge Corely performed an in-camera  
21 review and provided her tentative view on ADI in a  
22 hearing in April 2020.

23 So what really happened in April 2020,  
24 Judge Corely signaled that she would rule against  
25 Facebook on work product, and here's what she said, but



1 in terms of the ADI team, at least from what I've seen,  
2 it looks like a lot of that was just generated there  
3 separate that may have been reviewed but would have been  
4 done anyway. That's the heart of the dual purpose  
5 determination.

6 And then with regard to these 20 documents,  
7 you know, Facebook has sort of come up with a story  
8 about what happened with the 20 documents and what it  
9 really showed, but there is in fact a record and it is  
10 in fact clear what happened.

11 So in the hearing we had in which she  
12 discussed the 20 documents, she determined, quote, "A  
13 lot of it I don't think is relevant at all." For  
14 example, she said, "So you don't need to know -- you  
15 don't need to know like when a request for information  
16 was sent," and that plaintiffs wouldn't need those  
17 e-mails about "Are you available for this meeting" or  
18 "Can we move it?" "Should you change the weekly  
19 report?"

20 So basically we picked these 20 documents from  
21 a log. We didn't know what was the content of the  
22 documents. They were reviewed in camera. And a lot of  
23 the documents were irrelevant because they were just the  
24 kind of scheduling back and forth for meetings and the  
25 like that it wasn't helpful.

1           And Judge Corely identified that, and made  
2           the point -- she wasn't making some assessment of the  
3           underlying factual communications. She was making an  
4           assessment of the log that seemed to have a bunch of  
5           stuff that just didn't matter because it wasn't  
6           substantive at all.

7           So then Judge Corely ordered the parties to  
8           meet and confer to see if they could agree on a  
9           production. And she allowed additional briefing, which  
10          was submitted.

11          And Judge Corely issued an order allowing  
12          further briefing from Facebook. In that order she  
13          reiterated her view that much of the ADI documentation  
14          is discoverable. "While outside counsel's edits and  
15          advice might not be discoverable, the underlying facts  
16          are discoverable since Facebook would have conducted the  
17          investigation, regardless of any potential legal  
18          liability."

19          And here's where we get -- and I apologize for  
20          sort of walking through this as slowly as I am but it's  
21          important to unwind all of the ways that these events  
22          have been distorted to come to this conclusion that  
23          somehow she ruled on and ruled out internal  
24          communications.

25          So she says, "In particular plaintiffs seek

1 documents not created by lawyers from the enhanced  
2 examination phase that involve background and technical  
3 investigations to identify the potential for data  
4 misuse.

5 "They also seek documents from the enforcement  
6 phase, including Facebook conducted audits and  
7 interviews.

8 "As the Court understands, Facebook has not  
9 offered to produce any of this information. None of  
10 these documents were part of the in-camera review the  
11 Court earlier conducted."

12 That is a critical acknowledgment that really  
13 puts into perspective what this call log process was and  
14 what it revealed. It was a bunch of stuff that just  
15 didn't matter that much because it wasn't substantive,  
16 and the Court noted that.

17 SPECIAL MASTER GARRIE: Just one quick  
18 question. Sorry. Just a quick question.

19 MR. LOESER: Yeah.

20 SPECIAL MASTER GARRIE: In her order, I don't  
21 know if it's document 736, it says -- and I did read  
22 these orders. It says "This order disposes of" -- if  
23 you go back a slide -- "of docket No. 611, 612, and  
24 699."

25 And if you look, you're saying 699 at 5. How

1 slide, I think this really kind of gets to the heart or  
2 your question, Special Master Garrie, and really gets to  
3 the heart of Facebook's argument.

4 And Facebook takes this line from the order  
5 and the line -- and what Facebook said in its submission  
6 was the parties already litigated whether e-mails and  
7 attachments Facebook logged previously were  
8 discoverable.

9 "Judge Corely conducted an in-camera review  
10 and Judge Corely did not order a single one of those  
11 communications produced."

12 Now, what this sentence really refers to are  
13 the 20 e-mails that she reviewed in camera. Not every  
14 e-mail and attachment that Facebook logged in the  
15 exemplar stage.

16 And, in fact, Judge Corely did not find that  
17 logging exercise to be useful. It did not result in a  
18 resolution of the parties' dispute, which was  
19 plaintiffs' effort to discover the factual information  
20 relating to the ADI.

21 And Facebook is trying to take that and  
22 generalize and say, "Oh, she used those exemplars to  
23 come to a conclusion that none of this is discoverable."

24 And that's just not -- that's just so  
25 inaccurate.

1           If you go back and consider what she said  
2     about the materials that she reviewed in camera, those  
3     were the materials that are largely about scheduling  
4     meetings and whether meetings can be moved and the like.  
5     They are -- they were not substantive materials from  
6     which she was able to conclude and determine what should  
7     happen with the factual information plaintiffs were  
8     seeking.

9           And so as Mr. Ko just noted, she then moved on  
10    to the briefing that resulted in the September 8th order  
11    in which she did provide guidance on what the parties  
12    should do.

13          And so this idea that this logging exercise  
14    somehow resulted in a determination in the September 8th  
15    order that you don't get internal communications, it's  
16    just -- has nothing to do with what was actually learned  
17    from the logging exercise or the role the logging  
18    exercise ever played in resolving the ADI issues.

19          It's the September 8th order that resolves  
20    those issues. And it's the guidance that's provided in  
21    the order that applies to whether internal  
22    communications are discoverable.

23          And, you know, Facebook can say over and over  
24    again this issue was litigated and resolved by the  
25    order.

1           The order does not -- there's nothing --  
2       there's not a word in the order that says plaintiffs are  
3       not entitled to these internal communications. And  
4       there's nothing that happened with the 20 document  
5       logging exercise from which any conclusion can be drawn  
6       about these internal communications because that's  
7       really not what the Court was able to perceive from the  
8       communications.

9           SPECIAL MASTER GARRIE: Let me -- let me talk  
10      about these exemplar productions, and then we can --  
11      we'll continue forward.

12           One question I want to understand, I guess  
13      this is for Facebook as well as you, if you look at the  
14      pages you were just showing me, that I pointed out on  
15      page 140, whatever it is, if you turn to page 132,  
16      like -- there's way more -- as I understand this, this  
17      report covers way more than six apps. It covers all the  
18      apps, AppBank, which was identified by, at least  
19      according to this report, that was flagged on 137 --

20           If you go to page 137, if you load that back  
21      up, Counsel Ko, by chance, or whoever loaded it.

22           MR. KO: Yeah. I can share it. I have it up.

23           SPECIAL MASTER GARRIE: I just want to  
24      understand when we're saying exemplars, like this covers  
25      the production by Facebook for the six exemplar apps was